

Importance of the Operational and Search Activity in Investigation of Terrorism-Related Crimes

Zufyar S. Gataullin, Timur A. Gumerov, Vladimir N. Zhadan and Iskandar G. Mukhametgaliev
Elabuga Institute (Branch), Kazan (Volga Region) Federal University,
Kazanskaya Street, 89, 423600 Elabuga, Republic of Tatarstan, Russia

Abstract: This study touches upon several issues concerning the use of results of operational and search activity in the process of proving for criminal cases on the basis of the analysis of the current Russian laws and judicial and legal acts as well as using scientific and researchers' approaches. The researchers point at crime rate in Russia related to detection of terrorism-related crimes, emphasize the importance of operational and search activity in investigation of the specified category of crimes. Attention is drawn to the necessity of improving the criminal and procedural laws concerning the use of results of the operational and search activity in the process of proving and of formalising the list of procedural search activities.

Key words: Significance, legislation, legal acts, results of the operational and search activity, use, proving, terrorism-related crime, analysis, approaches, suggestions, Russia

INTRODUCTION

Operational and search activity is commonly and historically known (Gumerov, 2013) as the only official type of law enforcement activity helping to identify criminal activity at the early stages of its development to prevent its harmful effect and terminate a crime. Results of operational and search activity may encourage prosecution.

THEORY

The most important area where results of such activity for criminal prosecution may be implemented is proving in criminal cases (Gataullin, 2008a, b). Article 89 "using results of the operational and search activity in proving" of the code of the Criminal Procedure of the Russian Federation (hereinafter referred to as the CCP) stipulates that "it shall be prohibited in the course of proving to make use of the results of the operational and search activity, in case they do not meet the requirements made on the proof by the present code".

Analysis of provisions of the Article 89 of the CCP shows contradiction between the name and the wording, prohibiting the use of such results in the relevant case and presupposing this opportunity in case they meet the requirements determined for proving by criminal procedural laws. However, common practice shows that proving in terrorism-related crimes may not be efficient

without implementation of results of operational and search activity. With regard to the fact that the current version of the Article 89 of the CCP actually prevents it from efficient implementation of operational and search activity in the criminal procedure and prohibits the use of its results without criminal procedural control, we assume that this Article shall be amended as follows: "it shall be allowed to implement results of operational and search activity if they don't meet the requirements made on the proof by the present code".

It is insufficient during operational and search activities to identify properties of corpus delicti if it is unobvious and refers to grave or especially grave crimes. It is also essential to lay the groundwork for preliminary investigation. In most cases one cannot exist without the other. Non-compliance with this rule may encourage initiation of a criminal case which might be discontinued. The data acquired by investigational measures and featuring properties of corpus delicti as well as presupposing criminal proceedings shall be represented to the agency of inquiry, a criminal investigation in the form of operation and search information and entered upon the record relevant the criminal case.

Article 11 "the use of results of the operational and search activity" of the Federal Law "on the operational and search activity" (Gumerov and Kruchenkova, 2014) (here in after referred to as the Law on the Operational and Search Activity) determines that "results of the operational and search activity may be used for

preparation and performance of investigatory and judicial activities and operational and search actions may encourage criminal prosecution and be represented to the agency of inquiry, a criminal investigator or the court carrying on proceedings or holding the data relevant the reported offence as well as implemented in proving for criminal cases as specified in provisions of criminal procedural laws of the Russian Federation prescribing collection, verification and evaluation of evidence”.

The same stand is taken by the Plenum of the Supreme Court expressed in its resolution from 31 November, 1995 (edited from 16 November, 2013 No. 9) “on issues concerning implementation of the constitution of the Russian Federation by courts during implementation of justice” suggests that “results of the operational and search activity may not be used as evidence unless verified by investigation agency”.

However, neither the Law on the Operational and Search Activity, nor the CCP of the Russian Federation contain legal norms on efficient use of results of the operational and search activity in proving for criminal cases. Article 6 of the Law on the Operational and Search Activity provides a list of investigative measures such as examination, inquiry, sample collection for a comparative study, test purchasing, examination of items and documents, observation, identification, inspection of buildings, edifices, terrain compartments and vehicles, control of mails, telegraph and other messages, monitoring of telephone conversations, retrieval of information from communication channels, strategic infiltration, controlled delivery, sting operation. However, order and reason for conducting these measures are not disclosed. Nevertheless, legal literature in particular features various opinions on the ways of using results of the operational and search activity in proving for criminal cases.

Academic community assumes that the operational and search activity shall be in no way confused with criminal proceedings. V.I. Zazhitsky suggests on the account that “The operational and search activity and criminal proceedings are two independent types of public activity, each of them having individual characteristics and properties. The use of results of the operational and search activity in criminal proceedings shall neither lead to their blending nor to substitution of criminal procedural measures and means of investigating crimes by investigative measures and methods” (Zazhitsky, 2006). A. Kozusev is of the same opinion, saying that “blending of the operational and search appliances and investigative officers do not imply the idea of subordination, blend of procedural and operational and search activities. Each of them remains independent, acting in compliance with their scope of duties” (Kozusev, 1997).

Decision of the Constitutional Court of the Russian Federation from 01.12.1999 No. 211-I determines that legally specified procedural activities may not be substituted by the investigative measures.

In practice when carrying on investigative activities in a specific procedural form and application of relevant cognitive means, results of the operational and search activity are recorded in procedural documents which is formalised in the data forming the objective basis of the evidence. Hence, the data collected in the process of proving acquires a legally established form.

S.A. Sheifer calls this process as “forming of evidence” which implies “putting the evidence into a proper procedural form instead of random fabrication” (Sheifer, 2004, 2009).

Reforms that took place in political, social and economic spheres Russia in the 90s of the 20 century, gave birth to a new type of market relations presupposing demonopolisation of the public property and establishing multiple forms of property, freedom of enterprise and other economic activities. This process turned to be not only complicated and economically unstable, causing negative effects in social life and economy (Zhadan, 2013) but a significant growth of crimes implying lucre, violence, corruption and other forms of offences as well as terrorism-related crimes.

According to the latest statistical data, the main part of terrorism-related crimes in Russia are detected by internal affairs agencies (hereinafter referred to as the IAA). Thus, in 2009 from 654 terrorism-related crimes 583 of them were detected by the IAA officers, while the investigation committee officers detected only 23 of them. In 2010 from 581 terrorism-related crimes 484 were revealed by the IAA officers while the Investigation Committee offices detected only 35 crimes. In 2011 from 622 terrorism-related crimes 502 of them were detected by the IAA officers while the investigation committee officers detected only 53 of them. In 2012 from 637 of terrorism-related crimes 530 of them were detected by the IAA officers while 28 of them were detected by the investigation committee officers.

The issues of criminological and criminal characteristics as well as methods of investigation of terrorism-related crimes were reviewed in a number of papers (Vassalaty, 2010; Zhadan, 2011; Feoktistov, 2004) which in no way deprives us from the possibility of considering the most topical problems in the relevant field. Therefore, our subject of research is a number of problems describing the operational and search activity in investigation of terrorism-related crimes.

It is widely known that a significant part of crimes including those related to terrorism are performed in latent conditions which means that their detection and

investigation are complicated and require an efficient combination of procedural and investigative measures. It is not only difficult but at times impossible to investigate such crimes using means established by criminal procedural laws only. Therefore, it is essential to implement the operational and search activities.

Thus, in accordance with Article 30, part 1 and Article 205, part 1, of the Criminal Code of the Russian Federation, A.A. Nasonov was sentenced to 3 years of imprisonment in maximum security penal colony by decree from 12 July, 2012 of the regional court in Kaliningrad. Using special operational and search actions, it turned possible for court to establish the fact of preparation for a terroristic act. This was proved by the evidence given by a special agent who acted as a party to the future terroristic act and showed that he managed to prevent Nasonov from finding his way through the fence and performing explosion of the mosque under construction as well as the acquired audio record of the conversation between Nasonov and the special agent.

We can't but agree with the assumption of T.A. Gumerov and A.O. Kryuchenkova that decisions taken by the investigation officer while examining a criminal case shall be based on facts of the case and comply with law and conscience (Gumerov and Kruchenkova, 2014). Successful investigation of the majority of crimes mostly depends on efficient cooperation of the investigation officer and the agency of inquiry. However, the quality of investigation of serious crimes remains low because investigation officers can rarely provide necessary cooperation with the investigative agencies, despite being thoroughly regulated by legal acts. For example, Article 38, part 2, clause 4 and Article 144, part 1, of the CCP of the Russian Federation contain norms helping the investigation officer to issue written investigative measures to be mandatorily performed by a body of inquiry. The order of the Ministry of Internal Affairs of the Russian Federation No. 280 (for official use) from 26 March 2008 "on affirming strategies of cooperation for subdivisions of internal affairs agency of the Russian Federation while investigating and solving crimes" implies the same idea that the investigation officer "encharges operational subdivisions officers to perform operational and search actions".

Besides, according to Article 12, part 9, of Federal Law "On Police" (hereinafter referred to as Law on Police), the investigation officer can commission police to perform operational and search actions. Article 13, part 10, of the said Law entitles police to perform such actions. A. Alexandrov, A. Kukhta, V. Terekhin consider it an advanced step of a law maker to amend the Law on the Operational and Search Activity.

In fact, the Federal law from 26 December 2008 No. 293-FL "on amendments to specific legal acts of the Russian Federation in so far as relevant exception from procedural rights of internal affairs agencies of the Russian Federation concerning examination of subjects of entrepreneurial activity" (Alexandrov, 2009) featured some amendments. According to Article 15, part 1, section 1, of the Law on the Operational and Search Activity, officers of bodies of inquiry were entitled to perform operational and search actions publicly and in private, make seizure of documents, objects, materials and messages as well as cut services in case of immediate danger to life and health of a person, danger to national, military, economic or ecological security of the Russian Federation. In case of seizure of documents, objects, materials when holding investigative measures an officer performing such seizure executes a process-verbal in compliance with requirements of criminal procedural laws of the Russian Federation.

E. Dolya calls this position into question. He deems a body of inquiry is a subject of criminal procedural activity responsible for performing criminal procedural powers concerning inquiry and urgent investigative actions. In cases specified in Article 40, part 2, of the CCP, a body of inquiry as a subject of criminal procedural activity is entitled to carry on solely criminal procedural actions. An agency of executive power entitled to perform the operational and search activity is not an object of criminal procedural activity. Agencies performing operational and search activity in conformity with Articles 1, 13, 14 of the Law on the Operational and Search Activity, are entitled to perform only operational and search actions therefore operational and search actions in public or privately may be performed only by agencies performing operational and search activity and never by officers of bodies of inquiry]. The criminal procedural legislation doesn't determine a specific list of search activities.

Meanwhile, legal sources name such search activities include sniffer dogs, underwater (house-to-house) research, composition and distribution of criminal profiling, inquiries of citizens, acquisition of their complaints and explanation, civilian screening according to records and system of criminal registration, scouring a place, laying an ambush and protective affairs, distribution of various queries, claiming and examination of documents, application of mass media.

Experts in procedural law have different views on the issue whether an investigation officer has a right to indicate in his order a list of operational and search actions to be performed by a body of inquiry. Some scholars think that an investigation officer may entitle a

body of inquiry to perform operational and search actions while others consider that a choice of a certain operational and search action is made by operational subdivision hence, the investigation officer cannot choose operational and search actions enlisted in Article 6 of the Law on the Operational and Search Activity.

Scholars support scientific approach of A. Kruglikov that "giving a body of inquiry mandatory commissions concerning operational and search actions, the investigation officer shall not specify in it the type of operational and search actions to be performed while executing its order" (Dolya, 2011).

However, the investigation officer cannot entitle all bodies of inquiry specified in Article 40 of the CCP to perform operational and search actions, since according to Article 13 of the Operational and Search Activity this right is granted to operational subdivisions of the internal affairs agencies, agencies of federal security service, federal body of the executive power in state security, customs service of the Russian Federation, external intelligence services, federal sentence implementation services, agencies controlling circulation of narcotics and psychotropic substances.

CONCLUSION

The operational and search activity is a type of activity performed both in public and privately by operational subdivisions of legally established public agencies within the scope of their duties by carrying on operational and search activities for protecting life, health, rights and freedoms of a man and a citizen, property, provision of public and state security from crimes (Article 1 of the Law on the operational and Search Activity) therefore the Decision of the Constitutional Court of the Russian Federation from 6 March, 2001 No. 58-O (Kruglikov, 2011), taking into account the importance of observance of rights and freedoms of a man and a citizen while performing the operational and search activity, indicated that all constitutional rights should be protected while performing operational and search actions.

It should be noted that due course of law is an integral part of a legal state and a guarantee for its development therefore it is evident that accurate and constant execution of laws and other legal acts while performing operational and search actions is attributive to all subjects of the operational and search activity. However, it cannot be denied that performance of operational and search activity is followed by restriction of rights and freedoms of citizens by secret intervention into vital rights of persons and companies therefore it is extremely important to observe the principle of legality by all subjects of criminal jurisdiction.

Researchers assume that it is reasonable to formalise in criminal procedure that in proving it is allowed to implement results of the operational and search activity, if they meet the requirements applicable to evidence in the CCP as well as give a list of procedural actions mentioned above.

Thus, this research represents analysis of the current provisions of the CCP, the Law on the Operational and Search Activity, some other laws and legal acts in so far as the use of operational and search activity in proving for criminal cases as well as official statistics concerning terrorism-related crimes, scientific approaches and authors' conception of the operational and search activity while investigating this category of crimes and suggestions on improvement of criminal procedural laws.

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